Supreme Court, U.S.
FILED
DEC 12 1997
CLERK

(2)

No. 97-819

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BERNARDINE GREENE,

Petitioner,

v.

ALAN GREENBERG, D.P.M.,
OPTIMUM PHYSICAL THERAPY CENTER,
LISA TEN EYCK, P.T.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW JERSEY SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

QUESTION PRESENTED

The question presented is whether plaintiff's failure to abide by a concise and clear procedural New Jersey Court Rule and the resulting dismissal of her appeal for that failure justifies United States Supreme Court review.

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STATEMENT OF THE CASE

Plaintiff's petition seeks to convince the Court that her appeal was somehow inappropriately dismissed by the New Jersey Superior Court Appellate Division for the failure to comply with a New Jersey Court Rule. Petitioner, *pro se,* claims that she made only one slight error

that resulted in prejudice to no party.[1] In reaching these conclusions, Petitioner distorts the underlying facts and procedural history. Petitioner simply failed to comply with New Jersey Court Rules by filing no less than twelve applications with the Courts following the jury's verdict.

As detailed below, there is no cause for this Court's intervention or interpretation of New Jersey Court Rules. Without citation to an appropriate factual basis for this Court's review, Petitioner continues to present the same arguments she has presented on multiple occasions to the New Jersey State Courts. Petitioner's rights were not violated by any decision of any court; she alone possessed the ability to perfect her appeal, yet she failed in that endeavor. New Jersey State Courts can adequately police and control their own docket. Petitioner should not now be permitted redress for her own shortcomings in perfecting her appeal of the Trial Court's decision.

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[1] Petitioner also claims that she in no way contributed to delaying this appeal. Rather, she asserts that the 2½ year delay was in large part due to the Court's lengthy consideration of each application. However, this appeal has been fraught with delays occasioned by Petitioner: Petitioner filed two applications with the New Jersey Supreme Court to file her petitions for certification *nunc pro tunc* and one unperfected motion to extend time to appeal; Petitioner filed an application to extend time to file her petition for Writ of Certiorari with this Court. Additionally, Petitioner failed to timely file each of her motions for reconsideration. Even Petitioner's first application to abbreviate trial transcripts was three months out of time. Each delay has resulted from Petitioner's erroneous actions.

ARGUMENT

A. The Petition Misrepresents The Procedural History Of This Action.

Throughout the petition, Petitioner claims that she made only one mistake in the process of her appeal, that she continually abided by New Jersey Court Rules and diligently and responsibly attempted to seek permission to abbreviate trial transcripts. Petitioner has simply misinterpreted and misconstrued the applicable Rules and, despite appropriate oppositions to Petitioner's applications with the Court pointing out the correct procedural obligations of an appellant, Petitioner failed to perfect her appeal.

Petitioner also asserts that it is patently obvious that the Appellate Division judges and New Jersey Supreme Court justices were misled because the transcripts she sought to abbreviate were not necessary for the appeal. Petitioner's assertions are unfounded; Respondents pointed out that the appropriate procedural process would be to make an application to the Trial Court prior to filing an appeal and not to file multiple applications with the Appellate Courts to abbreviate a transcript. Petitioner's claims are simply erroneous and unsupported.

Factually, Petitioner's claim arises out of the alleged negligent treatment rendered to her by Alan Greenberg, D.P.M., and Optimum Physical Therapy Center. Petitioner filed a personal injury action alleging medical negligence. Petitioner claimed that a steroid injection, administered by Dr. Greenberg, led to the development of reflex sympathetic dystrophy ("RSD").

On March 27, 1995, a jury trial commenced in this matter before The Honorable F. Michael Caruso, J.S.C.

Petitioner contended that she developed RSD as the result of Dr. Greenberg's injection and that this caused innumerable damages including a dissolution of her marriage, her loss of employment and serious psychological injuries. Petitioner also offered numerous additional areas of deviation from accepted medical standards on the part of Dr. Greenberg. These included deviations from accepted standards of medical care in the way he kept his office notes, up to the location of the steroid injection. Plaintiff, however, failed to causally relate many of these deviation to an injury. Dr. Greenberg continually denied any negligence or that he precipitated the development of RSD or any other injuries.

At the close of the trial, the jury deliberated and rendered a verdict of no cause for action in favor of all defendants. With regard to Dr. Greenberg, the jury found that he was negligent, but that such negligence was not the proximate cause of Petitioner's disability. Petitioner filed a motion for a new trial, but this was denied with the Trial Court noting that a number of allegations of deviation were not causally related to the injuries. Petitioner instituted a *pro se* appeal on July 25, 1995.

After filing the appeal, Petitioner failed to serve a complete copy of the trial transcripts as required by New Jersey Court Rules and failed to perfect her appeal by filing a Brief supporting her appeal. Rather than moving before the Trial Court to abbreviate the transcript as required by the New Jersey Court Rules, Petitioner filed numerous motions with the Superior Court of New Jersey Appellate Division and the New Jersey Supreme Court in support for her motion to abbreviate the transcripts. Each motion was opposed on the basis that the transcripts were necessary for a consideration of the

proximate cause issues implicated and because Petitioner continually represented to the Court that she was making a "weight of the evidence" argument which requires the appellate judges to canvass the entire record. Additionally, each opposition recounted that appropriate recourse would be to timely petition the Trial Court. Petitioner failed to comply.

Specifically, on October 26, 1995, Petitioner filed her first motion to abbreviate the transcripts.[2] The basis for this and all succeeding motions, according to Petitioner, was that this testimony would prejudice her appeal because it did not concern issues of the proximate cause of RSD. Petitioner continually insisted that the Appellate Division Judges would either be misled or confused if this testimony was permitted to be utilized. The Appellate Division denied this extraordinary relief on December 22, 1995.

On January 17, 1996, Petitioner filed a request for clarification of the previous denial, or, in the alternative, a request for reconsideration. That motion was denied on March 6, 1996. In that Order, the Court specifically noted, "Our denial is without prejudice to an application to the trial court in accordance with Rule 2:5-3(c)-(2)." Notwithstanding this direction, Petitioner filed two applications with the New Jersey Supreme Court for leave to appeal and for leave to appeal *nunc pro tunc*. Although Petitioner's application for leave to appeal *nunc pro tunc* was granted, her application for certification was denied.

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[2]The testimony Petitioner sought to abbreviate included testimony concerning her psychological condition. Petitioner claims that this is relevant solely to damages which the jury never reached. However, this testimony also revealed that the Petitioner's depression significantly predated her alleged injuries. RSD often occurs because of a pre-existing psychological component.

While the New Jersey Supreme Court motions were pending, Petitioner was directed by the Clerk of the New Jersey Superior Court Appellate Division to either perfect her appeal or file an application to stay the appellate proceedings. On July 29, 1996, Petitioner filed an application to stay the proceedings. Her sole basis for this application was that abbreviation of the transcripts was necessary to perfect the appeal. The motion was denied on August 27, 1996.

On September 24, 1996, Petitioner filed a motion for reconsideration of the August 27, 1996, denial of her motion to stay the appellate proceedings. That motion was out of time and was denied by Order dated October 31, 1996. As Petitioner's appeal had continued for well more than a year without perfection, Dr. Greenberg filed a crossmotion to dismiss the appeal. That application was based on Petitioner's continued attempts to delay the appeal and her lack of compliance with each of the above Court Orders. Petitioner's lack of prosecution and cooperation required dismissal. That application was granted by the Court on October 31, 1996.

Petitioner then filed a motion to extend time to serve a motion for reconsideration with the New Jersey Supreme Court. That application was never perfected. She also filed a motion with the Appellate Division for clarification and reconsideration of the Order dismissing her appeal. That motion was denied by Order dated December 16, 1996.

Petitioner then filed a Petition for Certification with the New Jersey Supreme Court as well as an application to file the petition *nunc pro tunc*. Although the Order to allow the filing *nunc pro tunc* was granted, the application for certification was again denied. Petitioner

then filed an application for a rehearing to the New Jersey Supreme Court. That application was likewise denied on June 18, 1997.

Near the expiration of the ninety days to appeal to the United States Supreme Court, Petitioner filed an application to extend time an additional sixty days to file the within appeal. On November 17, 1997, two and one-half years after filing her appeal, Petitioner filed the within Petition for Certiorari with the United States Supreme Court.

B. Petitioner Misrepresents The Reason Why Her Appeal Was Dismissed.

Petitioner contends that her appeal was dismissed because of Respondent's alleged attempt to mislead the Court. Petitioner simply misunderstood Respondent's immediate oppositions to each and every motion that she filed; each attempted to convey the appropriate procedure for the relief she requested. As will be outlined below, Petitioner never complied with the New Jersey Court Rule she was attempting to utilize. Petitioner made multiple errors which increased the burden on the defense, ignored judicial efficiency and severely prejudiced the rights of Dr. Greenberg.

New Jersey Court Rule 2:5-3(c) provides in pertinent part:

> The transcript may be abbreviated in all actions . . . by order of the *trial judge* or agency which determined the matter on Appellant's motion specifying the points on which the Appellant will rely on the appeal. The motion *shall be filed and served no later than the time of filing and service of the Notice of Appeal* . . . . (emphasis supplied).

The plain meaning of that Rule is that if a Petitioner desires to abbreviate the transcript without the consent of her adversaries, she must move solely before the trier of fact (not the Appellate Division or the Supreme Court) in an effort to abbreviate the transcript. The underlying reason to make the application to the Trial Judge is that following the trial, he or she is in the best position to determine which transcripts are necessary for the appeal. Petitioner never made the appropriate application to the appropriate court. Each and every one of Petitioner's applications was erroneous and patently frivolous.

Furthermore, Petitioner cannot complain that she was unaware that this application should have been made to the Trial Court; in each and every opposition brief, Respondent quoted the Rule and plainly indicated what would be appropriate compliance. Petitioner simply did not understand and/or failed to abide. Petitioner even failed to follow the dictate of the Appellate Division. Petitioner now contends that she did not understand the implication of that Order. Petitioner's feigned ignorance is simply inconsistent with the clarity of the Rule.

Additionally, the Rule provides that the time to file this application is no later than the time for filing the Notice of Appeal. As Petitioner concedes, she filed her appeal on July 25, 1995 and did not file her first application to abbreviate the transcript until the end of October, 1995. This application was untimely and filed with the wrong court. The Respondents have consistently opposed each and every application on the basis that it was inappropriately filed. Petitioner cannot complain that she is or was unaware of how to proceed. Despite her *pro se* status, upon which Petitioner conveniently and consistently relies, Petitioner is still required to follow the New Jersey Court Rules.

Petitioner insists that she attempted to comply with all New Jersey Court Rules. She places the blame for the dismissal of her appeal not on her own misunderstanding, however, but upon Respondent's attempts to clarify the Rules and upon bad advice from her appellate case manager.[3] She asserts that she came to understand that the worst that could have happened during her numerous applications was that the Court could demand that she comply.

However, that is precisely what was done by the Court through each and every Order. By denying Petitioner's applications, the Court directed her to file the transcripts and proceed. Petitioner never complied. Had Petitioner simply filed the complete transcript of the trial, more than 2½ years of expense and delay could have been avoided. Because Petitioner was making a "weight of the evidence" argument, her requested relief was inappropriate. Dr. Greenberg has been forced to expend significant resources in defending each and every one of these patently frivolous applications. There is no greater prejudice. The frivolous motions had to cease. The New Jersey Superior Court Appellate Division, rarely hears interlocutory motions, especially numerous motions for clarification and reconsideration concerning an application which was never appropriately before the Appellate Division in the first instance. Petitioner cannot place blame on the Appellate Division for her own failure to perceive and understand the Court Rules.

Petitioner also argues that she was unaware that the Court had the inherent power to dismiss her appeal.

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[3] Implicit in this attempt to blame the Appellate Division is that Petitioner, on numerous occasions, contacted and corresponded with Appellate Division clerks *ex parte* in order to secure legal advice for how to proceed. This is inappropriate.

Despite this, Petitioner has indicated that she has a copy of the New Jersey Court Rules and is very willing and able to read the Rules and abide by them. It is clearly stated in New Jersey Court Rules 2:8-2 and 2:9-9 that the Appellate Court has the inherent power to dismiss an appeal. If Petitioner did not understand that those Rules existed, she was certainly aware at the time that the Respondents filed their motions to dismiss the appeal that the relief requested could be secured. However, when that application was filed, Petitioner did not retreat in her argument. She continued vehemently to insist that the transcript should be abbreviated. That was not the point or purpose of the motion to dismiss. The motion to dismiss was based upon Petitioner's continued failure to abide by the New Jersey Court Rules and the Orders of the Appellate Division.[4]

The New Jersey Superior Court Appellate Division has the power to police and control its own docket. Both of the aforementioned Court Rules provide that the Appellate Court can dismiss an appeal based upon Rule transgressions. In *State Highway Commission of the State of New Jersey v. Union Paving Company*, 33 N.J. Super. 85, 109 A.2d 424 (App. Div. 1954), the Court held that "failure to comply with the Rules on appeal is sufficient reason for dismissal of the appeal." 33 N.J. Super. at 89, 109 A.2d at 426. Similarly, in *Cherry Hill Dodge, Inc. v. Chrysler Credit Corp.*, 194 N.J. Super. 282, 283, 476 A.2d 860, 861 (App. Div. 1984), the Court dismissed an appeal due to procedural deficiencies

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[4]It should be noted that Petitioner violated multiple, additional Appellate Rules: Rule 2:6-12 requiring two copies of all pleadings be filed with all parties to the appeal (Petitioner only provided one); Rule 2:11-6 requiring motions for reconsideration be filed within ten days of the initial Order. Petitioner's Briefs and Appendices also did not comply with pertinent Court Rules.

by the plaintiff. As in those cases, Petitioner here failed to comply with the Rules, failed to serve a complete copy of the transcripts and failed to perfect her appeal. Dismissal was the only available remedy as Petitioner did not abide by the previous Orders.

It is respectfully asserted that the Petitioner had more than ample opportunity to have her day in Court and that this opportunity was only lost due to her dilatory tactics in prosecuting her appeal. Dr. Greenberg is entitled to move forward with his life and should not be held in a meritless litigation forever based upon continued attempts to seek inappropriate relief.

REASONS FOR DENYING THE WRIT

The Petitioner's claim that the New Jersey Courts denied Petitioner due process of law does not warrant review by this Court. The decision to dismiss Petitioner's appeal below was a plainly correct application of settled law, does not involve the interpretation of federal law or federal statute and does not represent a conflict between decisions of the State's highest Court and any other Court.

Pertinent to this discussion, United States Supreme Court Rule No. 10 provides:

> Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . . (b) a state court of last resort has decided an important federal question in a way that con-

> flicts with another state court of last resort or of a United States Court of Appeals;
>
> (c) A state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.
>
> *A petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.* (Emphasis added.)

Here, the New Jersey Supreme Court has not decided a federal question, nor is there a question that must be settled by this Court because of a conflict with any other decision. In fact, this petition is solely concerning the New Jersey Superior Court Appellate Division's interpretation of its own procedural Rules and precedents. There is absolutely no basis justifying further review by this Court.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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December 12, 1997